AUG 2 1 195
JOHN T. FEY, C

IN THE

Supreme Court of the United States

October Term, 1956

No. 341

HIRSCH LUMBER COMPANY,
Petitioner,

against

WEYERHAEUSER STEAMSHIP COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ISIDOR ENSELMAN,
Counsel for Petitioner,
80 Broad Street,
New York 4, N. Y.

MAX ORNSTEIN,
Associate Counsel.

The Hecla Press : : New York City
39

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	3
Statement	4
Reasons for Granting the Writ	7
Conclusion	13
APPENDIX:	
Statutes Involved	15
Opinion Below	17
Judgment Below	26

Cases and Authorities Cited

Alcoa Steamship Co. v. United States, 338 U. S. 421	7, 9, 10
Allanwilde Transport Corp. v. Vacuum Oil Co., 248 U. S. 377	8
British & F. Marine Ins. Co. v. Southern Pac. Co., 72 F. 285, aff'g 55 F. 82	10
80 Corpus Juris Secundum, pp. 1065, 1066	10
International Paper Co. v. The Gracie D. Chambers, 248 U. S. 387	8
Pope & Talbot v. Guernsey Westbrook, 159 F. (2d) 139	8
Premos v. Fulton Steel, 222 F. 945	12

NOV 3 1958

245956

PAGE

Renton, G. H. & Co. v. Palmyra Trading Corp., 2 W. L. R. 232 9

Standard Varnish v. The Bris, 248 U. S. 392 8

Toyo Kisen v. W. R. Grace & Co., 53 F. (2) 740, aff'g 48 F. (2d) 850 ..... 8, 10

The Tornado, 108 U. S. 342 ..... 10, 12

Williston on Contracts, Rev. Ed. pp. 2346, 2349-50, Section 1103 ..... 10, 12

Statutes Cited

49 U. S. C. 905(a) 2, 10

49 U. S. C. 906 (a & e) 3, 11

46 U. S. C. 1304 (2j) 3, 11, 12

46 U. S. C. 1304(4) 6

IN THE

Supreme Court of the United States

October Term, 1956

No.

HIRSCH LUMBER COMPANY,

Petitioner,

against

WEYERHAEUSER STEAMSHIP COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on June 1, 1956.

Opinion Below

The opinion of the Court of Appeals printed on pages 17-25 of Appendix hereto (not reported as of this date).

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 1, 1956 (R. 24a) and copies are appended to this petition (p. 26 of Appendix hereto). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

The bill of lading provided that the carrier transport the lumber from the State of Washington and deliver same at Newark, New Jersey in consideration of the freight stated therein. Delivery at said point was a condition precedent to the payment of said freight. Over the objection of the cargo owners, the carrier discharged the cargo at Baltimore, Maryland and there demanded and received the full freight—*i.e.* freight for delivery at Newark, New Jersey. The following questions are presented:

(1)

Where a bill of lading makes delivery at the destination set forth therein a condition precedent to payment of freight, is such provision to be given effect notwithstanding another provision in the bill of lading (par. "11" thereof) which provides that the carrier is entitled to the full freight as soon as the cargo is received by the carrier regardless of delivery?

The lower Court completely ignored the first provision favorable to the shipper, and gave full effect to the latter provision favorable to the carrier, thereby refusing to follow the U. S. Supreme Court (see pp. 7-8 hereof).

(2)

Is Title 49 U. S. C. 905(a) which provides that the practices and regulations of the carrier and the provisions of the bill of lading issued by it shall be fair and reasonable, violated by paragraph "11" of the bill of lading which provides that a carrier is entitled to the full freight as soon as it receives the cargo regardless of whether it delivers same at destination set forth therein and even if the carrier completely fails to make delivery.

(3)

Is Title 49 U. S. C. 906, Subdivisions a and c which provides that the carrier shall file schedules of freight charges between certain points and prohibits it from demanding or collecting any different charges, violated by paragraphs 6 and 11 of the bill of lading which require the cargo owners to pay the full freight between the point of origin and the point of destination set forth in the bill of lading, even if the carrier delivers at a point other than said destination or fails to make any delivery?

(4)

Where a carrier claims it is excused from performing by reason of a strike as provided in 46 U. S. C. § 1304(2)(j) is the carrier also entitled to the full freight which is compensation for full performance?

(5)

Whether the plaintiff received a fair trial in view of the trial judges' charge to the jury that the defendant was entitled to the freight as soon as the cargo was received by it and that the plaintiff was not entitled to return thereof. This made judgment for the carrier mandatory without considering any of the issues. Under that charge the jury was to bring in a verdict even if the carrier could have discharged the cargo at Newark, New Jersey. The Court's charge deprived plaintiff of a trial of the issues by the jury.

Statute Involved

The statutory provisions involved are 49 U. S. C. 905, 906; 46 U. S. C. 1304(2j), and 1304(4). They are printed on page 15 of Appendix.

Statement

This action was commenced in the Supreme Court of the State of New York, County of New York and was thereafter removed by defendant to the United States District Court for the Southern District of New York, on the ground of diversity of citizenship.

Hirsch Lumber Company, petitioner herein, is in the wholesale lumber business with an office in New York City. It purchased certain lumber from Simpson Logging Company of Shelton, Washington. The purchase agreement expressly provided that the seller was to procure transportation for said lumber to Independent Terminal, Port Newark, New Jersey (R. 4, Ex. 1).

Pursuant to said agreement the seller delivered the lumber to the Weyerhaeuser Steamship Company (hereinafter referred to as Weyerhaeuser or carrier) the respondent herein, and the latter thereupon issued its bill of lading whereby it undertook to deliver said cargo at the Independent Terminal, Port Newark, New Jersey (R. 4, Ex. 2). The place of discharge or delivery is generally important but with bulky and heavy cargo like lumber, it is extremely important as was established at the trial. The freight stated in the bill of lading was for transportation from Olympia, Washington, where the lumber was received by the carrier, to the Independent Terminal, Port Newark, New Jersey and delivery thereat.

It is of utmost significance on this appeal that the very first paragraph of the bill of lading provides that only on delivery of cargo at the destination set forth in the bill of lading shall the freight be paid. Until that condition is performed there is no obligation to pay such freight. It should also be observed that at the time the carrier received the lumber for transportation, it did not demand, and did not receive payment of said freight and that the bill of lading did not provide for payment of the freight at said

time. The carrier thereafter sent a number of written documents including invoices and various notices. In all these, the carrier stated that the obligation of the petitioner under said bills of lading was to pay the freight after the cargo was discharged at the Independent Terminal, Port Newark, New Jersey (Exs. 5, 26a-26e). The uncontradicted testimony at the trial was that there exists a long, well-established custom in connection with lumber shipments from West Coast to Port Newark to the effect that the carrier is not entitled to the freight except when the cargo is discharged at the destination set forth in the bill of lading and that the carrier and shippers recognize such custom and act in accordance therewith (R. 7, Exs. 5, 26a-26e).

The carrier breached said contract of transportation in that it failed and refused to discharge the lumber at the Independent Terminal, Port Newark. Over strenuous objections of the petitioner and other cargo owners, the carrier directed the vessel to Baltimore, Maryland and there discharged the lumber. Petitioner thereupon demanded that the carrier forward said lumber to Port Newark and thus perform its agreement. However, the carrier insisted that it will deliver the lumber only in Baltimore, and that before the petitioner could get its lumber it must pay the full freight set forth in the bill of lading for delivery at Port Newark. In order to get its lumber the petitioner paid such freight and at its own cost and expense transported the lumber to New Jersey (R. 5-7, 52-56, Exs. 6, 7, 9, 15, 18, 19, 23, 25).

The A. R. Hall Lumber Company and Channel Lumber Company also had lumber on the same vessel and they duly assigned and transferred to the plaintiff their respective claims against defendant (Exs. 10A, 10B and 10C). All these claims are substantially alike, with the exception that the bills of lading issued for lumber to Channel Lumber provided that same shall be discharged at the Atlantic

Terminals Inc., Port Newark, New Jersey, whereas the bills of lading for lumber to be delivered to A. R. Hall, and Hirsch, the petitioner, provided that same be discharged at the Independent Terminal in Port Newark, New Jersey *i.e.* a different pier or terminal in the same city.

At the time of the arrival of the vessel there was a strike of the employees of Atlantic Terminals, Inc. There was no strike or labor difficulties at any other terminal in Port Newark nor anywhere else in the New York Harbor. It was conclusively established that all the lumber could have been delivered either at the Independent Terminal, Port Newark, or at any one of the numerous terminals in Brooklyn, as these were not affected by the strike. As a matter of fact the carrier did discharge in Brooklyn the lumber consigned to other shippers. The carrier did not even make any effort to deliver the lumber involved herein, at the Independent Terminal or in Brooklyn. In view of the conclusiveness of this testimony this must be deemed established as a matter of law. These terminals were the nearest to those specified in the bills of lading. The carrier was therefore not justified in discharging at Baltimore, Maryland—a relatively remote port. (R. 6-8, 11, 12, 15-20; S. M. 66, 84-87, 101, 160, 166, 168, 207, 208, 234, Exs. 6, 7, 9, 15, 18, 19 and 23). See also 46 U. S. C. 1304(4), which makes such discharge unreasonable.

The case was tried before a District Judge and jury. The Court charged the jury that under paragraph 11 of the bill of lading the defendant had fully earned the freight as soon as it received the cargo, that such freight belonged to it and was not to be returned to the plaintiff (S. M. 327, 331, 332, R. 25-26). The jury could not follow those instructions and render a judgment other than for the defendant. According to the learned judge's charge it was not even necessary for the defendant to deliver, or try to do so, or have a lawful excuse for not doing so.

The foregoing instructions by the Court were not merely on an equal basis with other instructions. They were prominent and in the forefront. The Trial Judge interrupted the plaintiff's attorney's summation to emphasize that the foregoing is the rule to be applied herein. The foregoing instructions by reason of their prominence and emphasis and the circumstances under which they were given eclipsed and nullified the other instructions, such as are mentioned in the opinion of the Court of Appeals.

After said charge the jury brought in a verdict for the defendant. On appeal to the Court of Appeals same was affirmed. On this petition we do not intend to deal with issues of fact. We will confine ourselves to questions of law, of national importance. However, we should add that we are not acquiescing in or approving the statement of facts contained in the opinion below, because it contains several important errors.

Reasons for Granting the Writ

(a)

The judgment below is contrary to the decision of the Supreme Court in *Alcoa Steamship Co.* v. *U. S.*, 338 U. S. 421. The carrier in that case relied, as does the respondent here, on the provision in its bill of lading that the freight to destination was due and payable as soon as the goods were received by the carrier, regardless of whether the cargo was delivered. The bill of lading in the *Alcoa* case also expressly provided, as does the bill of lading here, that the freight shall be paid when the cargo is delivered at destination. The Court in the *Alcoa* case in holding that the provision making delivery at destination a condition to the recovery of any freight should control and prevail over the first mentioned provision said, "The United States relies upon * * * the well settled law that freight is never earned until the cargo is delivered." And that in doing

so the United States "only asserted the privilege of any shipper under the admiralty law that it should not pay for what it does not get," and further "the law throws on all carriers the risk of performance, for performance is a condition to the shipper's promise to pay, just as performance is always a condition to payment in any contract of service."

Taking an exactly opposite course, the lower Court here gave full effect to paragraph 11 of the bill of lading and completely nullified the provision of the bill of lading herein, requiring the carrier to make delivery at destination as a condition precedent to earning the freight.

The Creuit Court of Appeals, Ninth Circuit, upon facts such as those in the case at bar decided exactly opposite to the lower Court here and denied the freight to the carrier (*Toyo Kisen* v. *W. R. Grace & Co.; Pope & Talbot, Inc.* v. *Guernsey Westbrook*).

The Court below relied on *Allanwilde Transport Corporation* v. *Vacuum Oil Company; International Paper* v. *The Schooner "Gracie D. Chambers," Standard Varnish Works* v. *Steamship "Bris"* all decided at the same time and reported in 248 U. S. However, in those cases the bill of lading provided that the freight must be paid when the carrier received the goods and such freight was actually paid at that time. It did not make delivery at destination a condition precedent to the payment of freight. Such provision would be meaningless where the bill of lading provided for the payment of freight when carrier received the cargo and where such freight was actually paid at that time, and those controlling distinctions were clearly pointed out in the *Alcoa* case and ignored in this case by the Court below. In the case at bar, as already stated, no freight was paid or demanded when the cargo was received by the carrier, no doubt because the bill of lading provided that such freight shall be paid only upon delivery at destination.

If the decision of the lower Court were to prevail, there would be no way in which merchants can contract for the delivery of the cargo at a specific port even though they pay the consideration for delivery thereat. The national importance of this question will be discussed hereafter. The *G. H. Renton* v. *Palmyra* case, decided by the Court of Appeal in England and relied on by the lower Court, is also contrary to the *Alcoa* case as well as the two cases decided by the C. C. A. 9th Circuit hereinbefore mentioned. It should also be noted that the *G. H. Renton* case is now pending before the House of Lords, by permission granted to the shipper to argue his appeal there. This is some indication of the importance of the issues presented by this appeal.

The opinion below misapprehends the issue. The very first sentence thereof states that the issue in this case is whether the bill of lading could lawfully provide that the freight becomes due upon the receipt of the cargo by the carrier. That is not the issue because it fails to take into consideration another very important provision of the bill of lading. As already pointed out, the issue here is, as in *Alcoa Steamship Co.* v. *U. S.*, *supra*, whether a bill of lading provision that the cargo must be delivered at destination as a condition to earning the freight, should be given effect notwithstanding another provision therein (the one discussed by the court below) that the freight becomes due upon receipt by the carrier of the cargo.

Two other errors in the opinion should also be cited here. In certain portions of its opinion, th lower court erroneously assumes there was a strike in the Port of Newark and in the Port of New York. This assumption is important. For if that were correct, the carrier was justified in looking for another port. The conclusive proof, however, is that the strike was confined only to one pier—The Atlantic Terminals Inc. All the other terminals were not affected by the strike. The opinion below also recites

in great detail and makes much ado about the carrier's efforts to unload at a "public terminal" in Newark. How is that relevant? The uncontradicted fact is that the Independent Terminal in Port Newark, to which much of the lumber was consigned, was ready, willing and able to unload all of the lumber involved in this action (see p. 6, *supra*).

(b)

Paragraph 11 of the bill of lading contravenes 49 U. S. C. 905(a) which provides that the rates, regulations and practices of the carrier as well as the provisions of the bill of lading issued by it must be just, fair and reasonable; and declares unlawful and unenforceable any provision in the bill of lading or practice not meeting this requirement.

Paragraph 11 compels the shipper to pay full freight to destination even though the carrier never delivers the cargo and even if the vessel never leaves the port of loading. This is the only specie of transaction where one party gets the full consideration although he fails to perform the services for which the consideration was given. It is a dishonest provision and is contrary to good conscience, fair dealing and the current of enlightened law and has been condemned judicially and in authoritative treatises (*Toyo Kisen* v. *W. R. Grace & Company,* 53 F. (2d) 740 at page 742; *Alcoa Steamship Company* v. *U. S., supra, The Tornado,* 108 U. S. 342; *British & F. Marine Insurance Co.* v. *Southern Pacific Company; 80 Corpus Juris Secondum* (pp. 1065, 1066); *Williston on Contracts,* Rev. Ed. pp. 2346, 2349-50, Sec. 1103).

The legality of paragraph 11 has never been passed upon prior to the enactment of 49 U. S. C. Section 905. The cases prior thereto held that the parties having voluntarily agreed to the insertion of such provision in the bill of lading, the Courts had no power to do anything about it but enforce same. These precedents continued to

be cited after the passage of the above statute without taking into consideration the existence of this law. However, this law gives the Court the power to determine whether such provision as paragraph 11 is just, reasonable and enforceable.

Paragraph 6 of the bill of lading also contravenes 49 U. S. C. 905 (a) because it is unjust and unreasonable. This paragraph 6 sets forth an almost infinite number of circumstances which would excuse the carrier from delivering at destination. Among other things, if it would be more costly to perform or inconvenient to the carrier, it need not perform and yet be entitled to the full freight. It then provides that if any such situation arises or if the carrier apprehends that any such situation might arise, he need not deliver at the port of destination, but can deliver at any other port or return to the port of loading. The carrier could thus deliver the cargo in San Francisco, Galveston or in Cuba and still demand the freight to Newark, New Jersey.

(c)

Paragraphs 6 and 11 of the bill of lading are unlawful because they violate 49 U. S. C. 906, subd. a and c. Said section provides that the carrier shall file with the Interstate Commerce Commission freight rates between stated points, and prohibits the carrier from demanding or receiving any greater or different rate. Under paragraphs 6 and 11 of the bill of lading the carrier can discharge the cargo in San Francisco, Texas or Cuba or fail to leave the loading port and still demand the freight for delivery at Port Newark, New Jersey.

(d)

Title 46 U. S. C. 1304(2)(j) has never been passed upon by this Court. The lower Court misapprehended and misapplied same. It should be noted that the bill of lading

makes no mention of a strike or its effect upon the obligations of the parties. The Carriage of Goods by Sea Act, however, sets forth the rights, duties and obligations of the carrier in the event of a strike. This provision governs and prevails over any provision in the bill of lading 46 U. S. C. 1302 and 1304(2)(j).

The question presented here is, does Section 1304(2)(j) which provides that a carrier shall not be liable for any damages resulting from a strike not only relieve the carrier from any such claim but in addition thereto require the shipper to pay the full freight as though the carrier fully performed. The lower Court's answer in the affirmative is based on a misconception of the law.

The authorities hold that freight is the consideration for the carrier's performance. That a lawful excuse for performance is not the same as performance and the authorities further hold that a provision excusing a party from performance can only be used as a defense to an action wherein it is sought to compel performance, or where damages are sought for failure of performance. The authorities further hold that a clause such as 1304(2)(j) can not be used to procure or keep the consideration for performance (*Premos* v. *Fulton Steel*, 222 F. 945; *The Tornado* case, 108 U. S. 344 at pp. 351-352; *Williston on Contracts* Rev. Ed. § 1103). Thus if A agrees to sell to B lumber for $100, subject to strikes, etc. and thereafter a strike occurs preventing A from performing—then even if B had suffered damages he cannot recover same because performance was made subject to a strike. However, A cannot demand the $100.

The Court below, as already pointed out, erroneously held that not only was the carrier under the provision above mentioned not liable for any damages for its failure to perform, but in addition thereto was entitled to the full freight as though it had fully performed.

(e)

It is obvious that the foregoing questions are of utmost importance to the merchants engaged in selling and shipping lumber from the West Coast of the United States to the Eastern States. This is one of the large industries of this nation. As the uncontradicted testimony at the trial proved, a custom has been in existence for a long time requiring the carrier to deliver the lumber to the port of discharge as a condition to demanding the freight. The industry believed that the bill of lading provision herein making delivery at destination a condition precedent to the payment of freight, gave effect to that custom (R. 7) until the decision in the case at bar. Under that decision there will be no way in which a seller and buyer can contract for delivery at the specific port desired by them. Nor would they have any way of compelling the carrier to perform the services for which it is paid. Here the parties had obtained a specific agreement from the carrier that he will deliver at Port Newark and that it will be paid the freight charged by it, when the cargo would be thus delivered. There was nothing further the parties could do to insure delivery at Port Newark.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ISIDOR ENSELMAN,
Counsel for Petitioner.

MAX ORNSTEIN,
Associate Counsel.

AUGUST 1, 1956.